

INTRODUCTION

THE STATE OF THE ART OF HIRE PURCHASE AND EQUIPMENT LEASING  
IN MALAYSIA

HIRE PURCHASE AND EQUIPMENT LEASING

by  
Dr Nik Ramlah Mahmood  
Lecturer  
Faculty of Law  
University of Malaysia

Seminar "Consumer Credit / Credit For The Poor"

13 -114 September 1989, Hotel Merlin, Kuala Lumpur

Organised by Selangor and Federal Territory  
Consumers Association

and

Federation of Malaysian  
Consumers Associations





## INTRODUCTION

The topic of my paper is **Hire Purchase and Equipment Leasing in Malaysia**. As is obvious from my paper, I have devoted the greater part of my discussion on the former. I have done so for a number of reasons:-

- 1) Personally I feel that Hire Purchase is far more relevant for a seminar with a theme like "Credit for the Poor" because hire purchase transactions affect individual consumers while equipment leasing transactions are entered into by companies. Rightly or wrongly one tends to assume that when companies deal with each other they are able to do so at arm's length.
- 2) While there is a Hire Purchase Act with all kinds of flaws and loopholes thus providing a fertile area of discussion, we do not have an Act which deals specifically with equipment leasing.
- 3) Complaints or other information about malpractices in equipment leasing are difficult to obtain. This may be because more reputable companies are involved in providing equipment leasing compared to those in hire purchase or it may be because lessee companies do not make public such complaints as they do not want to tarnish their company names.

It is important that I stress at this initial stage that I have not written my paper with the aim of producing a detailed exposition of the law on hire purchase and equipment leasing. Rather I have attempted to highlight some of the more important legal issues pertaining to each transaction and where relevant, to suggest reforms and remedies.



## A. HIRE PURCHASE

### 1. THE DEVELOPMENT OF HIRE PURCHASE

The invention of the sewing machine in the middle of the 19th century provided the perfect occasion for the introduction of hire purchase to replace the looser arrangements of selling on credit. The Singer Company claims the honour of being the pioneer of hire purchase trading back in the 1860s.<sup>1</sup> The pattern was soon followed by suppliers of other goods such as pianos, furniture and other household equipment.

The invention of the internal combustion engine which brought about the Motor Age accelerated the spread of hire purchase. Cars and motorcycles became ideal objects for hire purchase transactions. Success with cars soon resulted in the spread of hire purchase to gramophones, radios and later television sets.<sup>2</sup>

The growth and popularity of hire purchase meant that traders could no longer afford to provide the required credit to hirers by themselves. This was particularly so when expen-

---

1. Gordon Borrie and Aubrey L Diamond, The Consumer, Society and the Law, 4th ed. Penguin, P 156.

2. Harris, Maylor and Sheldon, Hire Purchase in a Free Society, Hutchinson, London 1961, PP 22-24



sive items such as motorcars became the subject of hire purchase transactions. Finance companies saw this as a golden opportunity to diversify their activities. They promptly came to the "rescue" of dealers by purchasing the relevant goods from the dealers and then as the new owners of the goods, entering into a hire purchase agreement with the consumer. Most, hire purchase transactions today involve three rather than two parties, that is, the hirer, the dealer and the finance companies.

The exact date for the introduction of hire purchase in Malaysia cannot be determined as very little has been written on the historical aspect of this transaction in Malaysia. It appears that the first case involving a hire purchase transaction was reported in 1926.<sup>3</sup>

Today, inspite of criticism from moralists who pint out that hire purchase 'ensnares people into debts they cannot afford to pay' and cynics who describe hire purchase as "pledging tomorrow's uncertain income for today's comforts

-----

3. Re Ong Boon Lem (1926) 2 MC 112. The issue in this case was whether a typewriter which was the subject of a hire purchase agreement was part of the hirer's assets when the the hirer became a bankrupt. See also Choo Yeow Ming, "The Hire Purchase Law and Practice in Malaysia", Faculty of Law, University of Malaya Project Paper 1974/75, p 13.

when, nothing could be set aside for the future" - hire purchase has become a way of life in most societies. It has come to stay and must be accepted as a fact of modern life. What remains to be considered is whether given the present state of the law, hire purchase works satisfactorily in the interest of the consumers. If there are loopholes and weaknesses in the law, how can we attempt to plug these loopholes and rectify the weaknesses to ensure that what has become a fact of modern life do not cause undue hardship to the very people whose lives hire purchase transactions affect most - the average consumer.

## 11. DEFINITION OF HIRE PURCHASE

At Common Law, Hire Purchase is often defined as a bailment or letting of goods with an option to purchase agreement as<sup>4</sup>

a letting of goods with an option to purchase and an agreement for the purchase of goods by instalments (whether the agreement describes the instalments as rent or hire or otherwise) but does not include any agreement -

<sup>4</sup> Section 2



(a) whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before the delivery of goods;

or

(b) under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature or description or description as the goods comprised in the agreement.

While the first limb of the definition corresponds with the common law definition, the second limb seems to extend the scope of hire purchase under the Act beyond the common law boundary. It includes an agreement to purchase goods by instalments provided that no property (that is, ownership) is to pass to the hirer at the time of the agreement or upon or at any time before delivery of the goods. This means that a contract of sale of goods on credit can be a hire purchase transaction under the Act provided property does not pass at the time of the agreement or before delivery of the goods. Such a sale does not amount to a hire purchase at common law because one basic ingredient - the option to purchase - is absent.

While in the above context, the statutory definition of hire purchase seems to be wider than the common law definition, it ought to be pointed out that there are transactions which are hire purchase transactions at



common law which do not come within the scope of the Act. This is because the Act excludes agreements entered into by a hirer who is engaged in the trade of selling goods of the same description of the goods let under the agreement. The rationale for this exclusion presumably lies in the fact that the Hire Purchase Act was introduced for the protection of consumers and not for the protection of dealers or retailers who may have entered into similar agreements with manufacturers, wholesalers or even finance companies for business purposes.

The distinction between the common law definition and the statutory definition of hire purchase is of 'great practical significance because as we shall see, not all hire purchase transactions in this country are covered by the Act. Where the Act does not apply, resort must be made to the common law.

#### 111. THE LAW RELATING TO HIRE-PURCHASE IN MALAYSIA: ACT AND 'NON-ACT' GOODS

It has to be stressed that the Hire Purchase Act 1967 does not cover all hire purchase transactions in this country. This is because the Act only applies in respect of hire purchase agreements relating to goods specified in the First Schedule thereto.<sup>5</sup> Although the First Schedule has

<sup>5</sup> Hire Purchase Act 1967, Section 1(2).



As various other items that are not within the scope of the Act had two amendments<sup>6</sup> since 1967, there are still numerous consumer goods, which though popular subjects of hire purchase transactions, are not within the First Schedule.

arises. What law governs hire purchase transactions

The List of Goods in the First Schedule are:-

1. Motor vehicles, namely-
  - (a) Invalid carriages; (b) Motor cycles;
  - (c) Motor Cars including taxi cabs and hire cars;
  - (d) goods vehicles (where the maximum permissible laden weight does not exceed 50 cwt); (e) Buses including stage buses;
2. Radio sets, television sets, tape-recorders, and any combination thereof;
3. Refrigerators and deep freeze, food preservers, and any combination thereof;
4. Sewing machines other than those used for industrial purposes;
5. Washing machines;
6. Vacuum cleaners;
7. Air-conditioning units other than those used for industrial purposes;
8. Electric or gas cookers and ovens;
9. Video Tapes/Cassette Recorders;
10. Typewriters;
11. Organs and pianos;
12. Photostat machines and copiers;
13. Hi-fi systems.

6

P.U. (A) 221/80 and P.U. (A) 149/83.



As various other items that are not within the scope of the First Schedule are frequently the subject of hire purchase transactions (such as encyclopaedia, computers, household furniture, keep-fit equipment, etc. ), the question arises: What law governs hire purchase transactions involving these so-called 'Non-Act' goods?

Is it just the common law or can related English statutes (in particular the English Hire Purchase Act 1938 and the Consumer Credit Act 1974) be applied by virtue of section 5 of the Civil Law Act 1956, which regulates the reception of English mercantile law into the country?

Generally Section 5(1) of the Civil Law Act 1956 provides that in all the Malay States (ie, excluding Penang, Malacca, Sabah and Sarawak), in the absence of local statutes, English Mercantile Law as administered in England on 7th April 1956 can be applied if suitable for local circumstances. The law relating to the Hire Purchase in England on that date was the Hire Purchase Act 1938. Section 5(2) of the Civil Law Act 1956 deals with the importation of English mercantile law in the states of Penang, Malacca, Sabah and Sarawak. In these states in the absence of local law, the law to be administered is the law to be administered in England in the like case at the corresponding period. Since 1974, the law relating to hire purchase in England is found in the Consumer Credit Act 1974 and some unrepealed provisions of the Hire Purchase Act 1964.



Hence, if English statutes relating to hire purchase are deemed to be applicable to transactions involving 'Non-Act' goods in Malaysia we thus have a situation whereby three different sets of laws govern hire purchase transactions in the country, viz.

- Goods under the Act - Hire Purchase Act 1967
- 'Non Act' Goods (Malay States) - Common Law and English statutes prior to 7th April 1956, that is the Hire Purchase Act 1938
- 'Non Act' Goods (Penang, Malacca, Sabah and Sarawak) - Common Law and Current English statutes.

This issue has yet to be definitively settled by the courts. While it may be safe to assume that the common law governs hire purchase transactions involving 'Non-Act' goods, it is less clear whether the English Hire Purchase Act 1938 applies. Judicial opinions on this issues seem to vary. In Thambipillai v Borneo Motors Ltd, Gill F.J. (as he then was) observed,<sup>7</sup>

" The common law rules relating to hire purchase agreements do apply here by virtue of the Civil Law Ordinance 1956,

7

(1963) MLJ 30 at p.-----.

but I have grave doubts as to whether the English statutes modifying the common law automatically apply."

In Mun Kai Piano Co. Ltd v Rozario, a Singapore district judge observed, 8

"On the facts in the present case, I have no doubts that the issue as to whether the defendant was liable, was one with respect to mercantile law generally.

Thus the English Hire Purchase Act 1938 applied here by virtue of section 3(1). (of the Civil Law Ordinance 1956)".

Although both the above-mentioned cases arose before the Malaysian Hire Purchase Act 1967 was passed, the opinions expressed therein are still valid vis-a-vis the law relating to 'Non Act' goods.

#### IV. THE HIRE PURCHASE ACT 1967

In the early days, the protection of the consumer was seldom the excuse for the legislature to intervene and regulate commercial activities. The courts too were more interested in jealously guarding concepts like sanctity of contract and upholding maxims like caveat emptor (let the buyer beware) than in consumer protection. This state of affairs suited the advocates of laissez-faire principles. It was generally assumed then that every man in entering into a commercial transaction, must look out for himself.



1) Formation and Contents of the Agreement

However the failure of more legal principles and maxims to protect the consumers soon became apparent and the era of commercial codification began in England with the passing of the Sale of Goods Act 1993 which qualified the freedom to contract and seriously eroded the principle of caveat emptor.

The Hire Purchase Act 1967<sup>9</sup> of Malaysia is clearly an Act which was conceived as a direct result of the failure of common Law principles to protect the consumers and the reluctance of the courts to tamper with the terms of a contract. In introducing the Act, the protection of the consumer was clearly foremost in the minds of the legislators. The Minister of Commerce and Industry made this clear when moving the Hire Purchase Bill:<sup>10</sup>

"....it is felt that hire purchase should be regulated, not so much as an instrument of economic management as in other countries, but mainly as a measure of protection for hire-purchasers against unscrupulous owners."

.....

<sup>9</sup> The bulk of the Act was borrowed from the New South Wales Hire Purchase Act 1960-1965.

<sup>10</sup> Proceedings of Dewan Rakyat, March 1967, p 5963

# 1) Formation and Contents of the Agreement

## The Pre-Contract Stage

Before a hire purchase agreement is entered into, the owner must give to the prospective hirer what is commonly called a Second Schedule Notice.<sup>11</sup> This in effect is a summary of the hirer's financial obligations under the proposed hire purchase agreement. It stipulates the cash price of the item, the term charges and other charges, the total amount that the hirer would be paying, the deposit and the monthly instalment.

This notice serves an extremely useful purpose. It allows the prospective hirer to have a clear picture of his financial commitments before he enters into the hire purchase agreement. This notice is particularly important in the light of various misleading advertisements pertaining to hire purchase- for example - "own an X brand television set for as little as \$39.90\* a month".

---

<sup>11</sup> Hire Purchase Act 1957, section 4(1).

Because of time constraint, the writer has not conducted independent surveys for the specific purpose of writing this paper. Most of the information relating to what happens in practice is gathered from a variety of sources such as C&P files and published newspaper reports and the extremely useful project paper by Helen K. H. "Hire Purchase Malpractice in Malaysia", Faculty of Law, University Malaya, 1982.



- With a Second Schedule Notice, a prospective hirer will realise that the \$39.90 is just the monthly instalments and that he has to pay at least a 10% deposit. On top of that he will also be able to compare the cash price of the goods and the hire purchase price.

As it cannot be denied that the Second Schedule Notice serves an extremely useful purpose, it is extremely regrettable that in practice such notices are either not given or given simultaneously with the hire purchase agreement.<sup>12</sup> Some finance companies are known to compile the Second Schedule Notice, the proposal form and the Third Schedule (Notice to hirers under section 3) and the agreement proper into one booklet all of which are filled in by the dealer and signed by the hirer on the same occasion.

- While section 4(i) does not stipulate the length of time that must lapse between the giving of the Second Schedule Notice and the signing of the hire purchase agreement, it is clear that if the notice is to serve any useful purpose, it must be given well before the agreement is signed.

---

<sup>12</sup> Because of time constraint, the writer has not conducted independent surveys for the specific purpose of writing this paper. Most of the information relating to what happens in practice is gathered from a variety of sources such as CAP files and publications, newspaper reports and the extremely useful project paper by Helen Koh, "Hire Purchase Malpractices in Malaysia", Faculty of Law, University Malaya, 1982.

Unfortunately, the efficacy and utility of section 4(i) is greatly diluted by the fact that the Act itself does not provide for any civil or criminal liability for non-compliance with the requirements of the section. The absence of a blanket penal provision in the Act means that where no specific penalty is provided for the breach of a particular provision, non-compliance with such a provision will not result in the owner/dealer incurring any liability. <sup>13</sup>.

However, thanks to the judicial creativity of the (former) Federal Court, in the case of Ariffin Credit (Malaysia) Sdn. Bhd v Yap Yuen Fui, <sup>14</sup> non-compliance with section 4(i) may prove costly for the owner. It was held in this case that a finance company has no capacity to enter into a hire purchase contract unless it had first complied with section 4(i), that is, non-compliance with section 4(1) would mean that the hire purchase agreement is void ab initio.

In the light of this decision, it is prudent for dealers to ensure that such a notice is given and if the post is used, it may be wise to use registered post as there will then be proof that such a notice has been sent. <sup>15</sup>.

-----

<sup>13</sup> The hirer may of course sue the owner/dealer for damages for breach of statutory duty. In such a suit however, the hirer must show, inter alia, that he has suffered injury/damage as a result of the breach - an element which may not be easy to prove.

<sup>14</sup> (1984) 1 MLJ 169.



# THE HIRE PURCHASE PRICE

The Act defines hire purchase price as the total sum payable by the hirer under a hire purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation for damages for a breach of agreement. <sup>16</sup>

The first ingredient in determining the hire purchase price is the cash price of the goods, that is the price at which at the time of signing the agreement the hirer might have purchased the goods for cash. <sup>17</sup> The owner is required to obtain from the hirer at least 1/10 of the cash price as deposit. <sup>18</sup> Other charges such as freight or insurance are then added.

- 
- <sup>15</sup> Section 43 of the provides three ways by which notices or documents required to be served or given under the Act may be served or given, viz:
- (a) delivering it to him personally;
  - (b) leaving it at his place of abode or business with another person over the age of 16 years;
  - (c) by posting it by registered post addressed to him at his last known place of bode or business.

<sup>16</sup> Section 2.

<sup>17</sup> Section 4(2) (e) (i).

<sup>18</sup> Section 31(i).

The other important ingredient of the hire purchase price is the term charges<sup>19</sup> or in more familiar language, the interest claimed by the owners on the amount financed. The formula for determining term charges is provided in the Sixth Schedule and when calculated as a rate per centum per annum, the term charges must not exceed 10% per annum.<sup>20</sup>

There are various forms of malpractice vis-a-vis the hire purchase price. A common one is where although an item if purchased is cash, such a discount is offered at a discount/is not given when a hirer decides to take the item on hire purchase, that is the list price is used. This clearly contravenes section 4(2) (e)(i) and hence by virtue of section 6(2) the owner is not entitled to enforce the hire purchase agreement or any contract of guarantee thereto or to recover the goods. Unfortunately however not many consumers are aware of this provision.

---

<sup>19</sup> Section 4(2)(c)(vii)

<sup>20</sup> See section 30(1) and Hire Purchase (Term Charges) Regulations 1968.



Other malpractices relate to the term charges. These take a variety of forms. An obvious one is where in calculating term charges a rate which is more than 10% is used. There are also instances where all sort of other additional charges are included in the hire purchase price under the guise of service charges, agreement fees, legal charges, etc. As all charges other than those listed in section 4(2) are deemed to be term charges, the owner who has charged the maximum rate of 10% acts in breach of section 30(1) in receiving all these other payments. In such a situation, section 30(2) gives certain remedies to the hirer but unfortunately no criminal sanctions are imposed upon the owner.

#### The Contract

Every hire purchase agreement must be in writing and must contain the details listed in section 4(2) (c). As it is common for contractual documents which are drafted by one party to the contract to be printed in such a way that the terms therein are almost invisible to the naked eye, section 45 of the Act clearly stipulates that all prescribed documents (including the agreement) under the Act must be in clear and legible handwriting or if printed, must be not be smaller than the type known as 10 point Times. An agreement which is not in writing shall be not enforceable by the owner.<sup>21</sup>

---

<sup>21</sup> Section 6(i). The Act does not state whether the owner in such a case can repossess the goods or enforce any guarantee relating thereto.



An important practical question vis-a-vis the hire purchase agreement is what happens if, as is very commonly done, the hirer is asked by the dealer to sign a blank hire purchase agreement and then the details are filled in by the owner after the transaction. For cases outside the scope of the Act, the law on this matter has been settled by the case of Ming Lian Corporation v Haji Nordin,<sup>22</sup> where it was held that such documents were valid provided there was no lack of consensus ad idem between the parties, that is, provided the blanks were filled in with particulars that have been agreed to by the parties.

The position under the Act has yet to be judicially determined. However as it is clear from the Act that every hire purchase agreement must be in writing; one wonders whether an agreement signed in blank is in writing. It is said that as the rationale for requiring the agreement to be in writing is to enable the hirer to be aware of the terms of the contract which he is signing, recognising the validity of agreements signed in blank would defeat this objective.<sup>23</sup>

Within fourteen days after the agreement has been entered into, the owner must send (a) a copy of the agreement, and (b) a notice as prescribed in the Third Schedule to the hirer.<sup>24</sup>

-----  
<sup>22</sup> (1974) 1 MLJ 52. This case involved a hire purchase agreement which was signed before the Act came into force. It is therefore still good law as far as "Non-Act" goods are concerned.

<sup>23</sup> P.Balan - "The Development of Hire Purchase Law in Malaysia" - A Mimeograph, Faculty of Law, University of Malaya.

<sup>24</sup> Section 5



..18..

In the Third Schedule Notice, the hirer is informed of his rights vis-a-vis the hire purchase agreement, in particular:

- that upon making a written request he is entitled to a copy of the written agreement and a statement of the amount owing under the agreement. He can only make this request once in three months.

- that with the written consent of the owner he can assign his rights under the agreement and that the owner cannot unreasonably refuse such consent.

- that he has a right to early completion and that if he does so he is entitled to a rebate of some of the charges under the agreement.

- that if he is unable to pay the instalments he is entitled to return the goods to the owner at his own expense but he will be liable to pay an amount sufficient to cover the owner's loss and,

- that if he were to remove the goods to a different address (from that stated in the hire purchase agreement), he must inform the owner of such changes, either in writing or in his presence.

..19..

The purpose of the Third Schedule Notice is to highlight to the hirer his more important rights and obligations under the agreement and to enable him to find out periodically the amount still owing to the owner.

Where the goods let is covered by an insurance policy, the owner must serve of cause to be served to the hirer, within seven days after the receipt of the policy, a copy of the policy or statement in writing setting out the terms, conditions and exclusions of the policy that affect the hirer's rights.<sup>25</sup>

While there is no criminal penalty for non-compliance with any of the above-mentioned requirements, the civil liabilities imposed upon an owner for breach of these requirements can prove costly. Such an owner shall not be entitled to enforce the hire purchase agreement or any contract of guarantee relating thereto or any right to recover the goods from the hirer. Further, no security given by the hirer in respect of money payable under the hire purchase agreement or given a guarantor under such a contract of guarantee shall be enforceable against the hirer or guarantor.<sup>26</sup>

---

<sup>25</sup> Section 5(3)

<sup>26</sup> Section 6(2)



..20..

However, if it can be shown that the hirer has not been prejudiced by the owner's non-compliance with any of the above requirements and provided it is just and equitable to do so, the court has a discretion to excuse any such non-compliance. This provided the court with some leeway when owners inadvertently or innocently fails to comply with any of these requirements, but the hirer is not prejudiced by such non-compliance.

### Implied Conditions and Warranties

Certain conditions and warranties<sup>27</sup> are to be implied in all hire purchase agreements. These include an implied warranty that the hirer shall have and enjoy quiet possession of the goods,<sup>28</sup> that is, his enjoyment with the goods will not be disturbed by the owner or by the lawful acts of third parties. Interference with the hirer's quiet possession normally results when the owner does not own a perfect title to the goods.

---

<sup>27</sup> The Hire Purchase Act does not define these terms, but generally a condition is a term of the contract, the breach of which gives the aggrieved party the right to repudiate the contract. A warranty is a term of the contract, the breach of which only gives the aggrieved party the right to sue for damages.

<sup>28</sup> Section 7(1) (a)

..21..

There is also an implied condition that the owner 'shall have a right to sell the goods at the time the property is to pass'.<sup>29</sup> The crucial time here is when the property is to pass, that is, when the hirer wants to exercise his option to purchase. There can only be a breach of this implied condition if at the time when the property is to pass (the owner) had no right to sell.<sup>30</sup>

There is also an implied warranty that the goods shall be free from any charge or encumbrances in favour of any third party at the time when the property is to pass.<sup>31</sup>

Finally there is an implied condition that the goods let are of merchantable quality<sup>32</sup>. Such a condition will not however be implied in the following circumstances:-

- where the hirer has examined the goods, as regards defects which the examination ought to have revealed,
- where goods are second-hand goods and the agreement contains a statement that the goods are second-hand goods and that all conditions and warranties as to quality and ~~are~~<sup>are</sup> expressly negatived and the hirer has acknowledged in writing that this has been brought to his notice.

-----  
<sup>29</sup> Section 7(1)(a)

<sup>30</sup> Per Azmi J in Ahmad Ismail v Malayan Motor Co and Anor (1973) 1 MLJ 177 at p 179.

<sup>31</sup> Section 7(1) (c)

<sup>32</sup> Section 7(2)



..22..

Hence the fact that second-hand goods are the subject of a hire purchase agreement does not ipso facto negate the implied condition as to merchantable quality. Such an implied condition can only be excluded if the above-mentioned conditions are satisfied.

The Act does not define the term 'merchantable quality'. However according to Wan Hamzah J. (as he then was) in *Lau Hee Teoh v Hargill Engineering Sdn. Bhd*<sup>33</sup> in order to show that an item is not of merchantable quality, it must be shown that it was of no use for any purpose for which it would normally be used and was therefore not saleable under that description.

If the hirer either expressly or impliedly informs the owner or dealer or their agent or servant the particular purpose for which goods are required, then it is an implied condition of the agreement that the goods shall be reasonably fit for such a purpose.<sup>34</sup>

---

<sup>33</sup> (1980) 1 MLJ 145 at p 147.

<sup>34</sup> Section 7(3).

..23..

### 3. Statutory Rights of Hirers

The Act in Part IV gives various statutory rights to hirers. The two most important of these rights are the right to early completion and the right to voluntarily terminate at hiring.

Early completion refers to a situation where the hirer exercise his option to purchase at any time before the period of hiring stipulated in the agreement comes to an end. A hirer who wishes to make an early completion must give a written notice to the owner of his intention to do so.<sup>35</sup> On or before the date specified for the early completion, the hirer must tender 'the net balance' due under the agreement to the owner.

In determining the net balance the owner must give to the insurer the statutory rebate for term charges and the statutory rebate for insurance if the hirer requires any contract of insurance to be cancelled as well.<sup>36</sup>

Statutory rebate for term charges is defined in Section 2 of the Act in extremely technical terms. Reduced to a mathematical formula however, it is :

---

<sup>35</sup> Section 14(1)

<sup>36</sup> Section 14(2)



$$\text{Statutory Rebate} = \frac{CN (N + 1)^{37}}{t (t + 1)}$$

where,

C = Term Charges

N = Number of complete months in the period of the agreement still to go

t = Total number of complete months in the period of the agreement.

Hence to borrow an example,<sup>38</sup> A wishes to make an early completion on the hire purchase of a car. He was charged \$1,850 as term charges, had completed 18 months of the agreement and had 18 complete months still to go (the duration of the hire purchase agreement being 36 months). The statutory rebate that he is entitled to for making an early completion is

$$\begin{aligned} \text{Statutory Rebate} &= \frac{CN (N + 1)}{t (t + 1)} \\ &= \frac{1850 \times 18 (18 + 1)}{36 (36 + 1)} \\ &= \frac{1850 \times 18 \times 19}{36 \times 37} \\ &= \$475.00 \end{aligned}$$

<sup>37</sup> Else-Mitchell and Persons, Hire Purchase Law, 4th Ed, 1975, p. 255.

<sup>38</sup> P. Balan. Op. cit.

While the method for determining the statutory rebate is clearly laid down in the Act, it is regrettable that in practice this formula is seldom used by owners. In most cases owners would have their own formula which inevitably results in the hirer getting less rebate than he is entitled to under the Act.

A statutory right which is seldom made known to hirers is the fact that they can opt for an early completion after the owner has repossessed the goods.<sup>39</sup>

Having entered into a hire purchase agreement, some hirers may wish to terminate the agreement without making an early completion, that is to terminate the hiring by returning the goods to the owner. The Act allows the hirer to do so by returning the goods to the owner during ordinary business hours at the owner's ordinary place of business.<sup>40</sup> Where the nature of the goods or the available facilities do not allow the hirer to return the goods at such a place, the hirer can return the goods to any place agreed to by the parties.<sup>41</sup> If no agreement can be reached an application can be made to Court to determine such a place.<sup>42</sup>

#### 4. Repossession

Before the legislature intervened, it was common for hire purchase agreements to contain clauses allowing the owner to repossess the goods for the slightest default on the part of the hirer. The owner could 'snatch back' the goods

---

<sup>39</sup> S. Section 14(3) (b). See infra.

<sup>40</sup> Section 15 (1)

<sup>41</sup> Section 15 (2)

<sup>42</sup> Section 15 (3)



even if the hirer failed to pay the last of 24 instalments. In such a case all the instalments already paid would be forfeited. The courts refused to provide the hirer with any leeway and instead rigorously enforced provisions pertaining to repossession in hire purchase agreements.

The Hire Purchase Act unfortunately does not deal with all types of repossession. It only deals with recovery of possession for any breach of the agreement relating to payment of instalment.<sup>43</sup> There must in other words be a breach relating to payment of instalments before the procedure laid down in the Act pertaining to recovery of possession can come into effect. The hirer's failure to pay instalments does not ipso facto give the owner a right to repossess. Such a right can only be exercised in two instances:-<sup>44</sup>

- 1) where there have been two successive defaults in payment of instalments; or
- 2) where there is a default in respect of the last payment.

On the occurrence of either of the above events, the owner must first serve upon the hirer a Fourth Schedule Notice, that is, Notice of Intention to Repossess. This is to provide the hirer with the time and opportunity to remedy the default. However, this requirement as to the notice need not be complied with if there are reasonable grounds to believe that the goods will be removed for concealed by the hirer, but the onus of proving this is upon the owner.<sup>45</sup>

---

<sup>43</sup> Section 16 (1).

<sup>44</sup> Section 16 (1).

<sup>45</sup> Section 15 (2).

There must be a minimum period of twenty-one days between the service of the notice and the act of repossession.<sup>46</sup> However once the Fourth Schedule Notice is given, there is no time limit within which the owner must repossess the goods. In United Manufacturers Sdn. Bhd. v Sulaiman bin Ahmad,<sup>47</sup> the owner repossessed the goods two years after service of the Fourth Schedule Notice and this was approved by the court. Within fourteen days after the owner has taken possession of the goods, the owner must serve on the hirer and every guarantor to the hire purchase agreement a Fifth Schedule Notice.<sup>48</sup> In this Notice the hirer is informed of all the possible avenues open to him vis-a-vis the goods repossessed.:

1) The Right to Reinstate the Agreement

He can within fourteen days require the owner to redeliver the goods and reinstate the agreement by paying all overdue instalments and interests thereon as well as all costs pertaining to repossession and redelivery.

2) The Right to Early Completion

He can within fourteen days notify the insurer that he intends to finalise the agreement, that is opt for an early completion.

3) The Right to Introduce a Buyer

He can introduce a cash buyer to the owner who is willing to pay the owner's estimate of the value of the goods.

46

Section 15 (1):

47

(1989) 1 MLJ 482

48

Section 15 (3)



If the hirer fails to take any of these measures, the notice makes it clear to the hirer that he would be liable for the owner's loss unless the value of the goods repossessed is sufficient to cover his liability. If the value of the goods exceeds the hirer's liability, then the hirer would be entitled to a refund.

Another statutory right given to the hirer upon repossession is the right, in certain circumstances, to recover part of the total payments that he had made to the owner.<sup>49</sup> Whether a hirer is entitled to such a refund and its exact amount, depends on (i) the value of the goods at the time of repossession, (ii) the amount already, paid by the hirer and the net amount payable.

In practice, malpractices are still prevalent even vis-a-vis repossession that comes within the scope of the Act.

The Notice of Intention to repossess is frequently not received by hirers although owners insist that they have sent out such notices. As most hire purchase agreements contain a clause that provides that the owner is entitled to repossession upon default of payment, most hirers do not realise that repossession for default of payment without prior notice contravenes the Hire Purchase Act and owners are in fact extremely comfortable with this ignorance. In fact even if a clause allowing the owner to repossess without notice upon default in payment is included in the agreement, such a clause is void and of no effect as it attempts to exclude, modify or restrict a provision in the Act, that is section 16.<sup>50</sup>

The other prevalent malpractice is violence in the course of repossession. Newspapers frequently carry reports of

<sup>49</sup> Section 18(1) (b).

<sup>50</sup> See section 34 (g)



how thugs repossess motocars and motorcycles from the hirers on the road or how 'well built characters' repossess household goods in a gangster-type operation. While some owners insist that they have reputation to maintain and only carry out repossession strictly by the book, others admit to engaging 'odd job people' or even people of doubtful character for the job.<sup>51</sup>

The other common complaint is the forcible entry of the hirer's premises by persons acting on the owner's behalf for the purpose of repossessing the goods. The owner or his agent cannot intrude into the hirer's premises unless there is a court order or permission has been granted by the hirer. Otherwise the hirer can sue the owner and his agent for the tort of trespass. Neither can the owner include in the hire purchase agreement a clause which expressly gives the owner a right of entry into the hirer's premises as such a clause will be void under section 33(a) of the Act.

The other common malpractice vis-a-vis repossession is in quoting over inflated and sometimes unwarranted repossession fees. There have even been instances where a hirer who took the trouble to return the car to the owner after receiving repossession notice, was charged \$350/- in repossession fees.<sup>52</sup> Others inflate the costs of repossession, maintenance, repair and redelivery. Furthermore as mentioned earlier there can be instances where after repossession the hirer is entitled to a refund. Often different formula which either shows that the hirer is entitled to a smaller refund or no refund at all, is used by the owners.

---

<sup>51</sup> Helen Koh, Op. cit.

<sup>52</sup> Consumers Association of Penang, The Hire Purchase Trap, CAP 1986.



## 5. Problems arising out of Triangular Hire Purchase Transactions

As mentioned earlier most hire purchase transactions nowadays do not involve just two parties but three - the hirer, the dealer and the finance company. With the rapid increase in the volume of hire purchase business, traders or dealers no longer bear the financial burden of hire purchase transactions on their own; they have to depend upon third parties (usually finance companies), who would be able to take from them the financial burden of hire purchase transaction, while allowing them to continue supplying goods on hire purchase terms. This is where finance companies have a role to play.

A triangular hire purchase transaction comes about when a potential hirer decides to take an item on hire purchase, the dealer arranges to sell the item to a finance company. The finance company as the owner of the item will then enter into a hire purchase agreement with the hirer. The dealer gets immediate cash and hence is not burdened by the hire purchase transaction; the finance company which is already in the business of lending money, gets another form of business and the hirer is able to get the item he wants. On the face of it therefore there seems to exist a very practical and cosy arrangement between the parties; each depending in some degree, upon the other. strictly speaking therefore there is no contract between the dealer and the hirer and if the dealer had made any misrepresentations, the owner would only be liable if it can be shown that in so doing the dealer was acting as agent of the owner.

The Hire Purchase Act recognises the fact that triangular transactions are a commercial reality and has numerous provisions dealing with the relationship between hirers, dealers and owners.



Where a dealer in such a transaction makes false or untrue representation to the hirer in the course of negotiations leading to a hire purchase agreement, the Act provides the hirer with specific remedies against both the dealer and the owner. As against the owner, the hirer would have the same right to rescind the agreement as if the representation had been made by his agent. As against the dealer, the hirer has the same right to sue for damages as if the hirer had purchase the goods from him.<sup>53</sup> The owner cannot, in the hire purchase agreement exclude his liability for the misdeeds of the dealer.<sup>54</sup>

The hirer's right against the owner is a right to rescind the hire purchase agreement, that is, the right to annul the contract,. The hirer need not prove agency - the Act creates a national agency between the dealer and the owner not in all instances but only vis-a-vis representations, warranties and statements made up to the time of the agreement. The agency is only created for the purpose of giving the remedy of rescission to the hirer, but not for other purposes. The Hire Purchase Act does not state the legal consequences of a rescission. However the Contracts Act 1950 provides that where an innocent party rescinds the other party is discharged from his obligations.<sup>55</sup> The party rescinding the contract must also restore any benefit which he received to the person from whom such benefit was received.<sup>56</sup>

---

53 Section 8(1)

54 Section 8(2)

55 Contracts Act 1950, section 65

56 Section 66



Apart from the right to rescind the agreement, the Act also gives the hirer the right to sue both the dealer and the owner in damages.<sup>57</sup> The hirer has a statutory right to sue the dealer for damages and as such he need not prove either the existence of a collateral contract or negligence. This remedy however is only useful if the dealer can afford to pay the damages awarded against him. If the dealer does not seem to have the means to pay the damages awarded against him, then the hirer can also sue the owner for damages for the misrepresentation by the dealer. For this purpose, unlike for the purpose of rescinding the contract however, there is no presumption of agency. In other words, the hirer must first prove that the dealer was acting as the agent of the owner before he can sue the owner for damages for representation.<sup>58</sup>

Apart from protecting the hirers, the Act also provides a degree of protection for owners who may realise a little too late that they have been dealing with unscrupulous dealers. An owner who has been made to pay damages to the hirer because of misrepresentation, etc. of the dealer shall be entitled to be indemnified by such dealer.<sup>59</sup>

One of the common complaints made by hirers involved in triangular transactions is the refusal of the dealers to have anything to do with the hirer once the agreement is signed. Some of the dealers have even refused to honour the guarantees that they have given for goods which are subject to a hire purchase agreement.

---

57 Section 8(1) (b)

58 Lau Hee Teah v Hargill Engineering Sdn. Bhd. (1969)2 MLJ 68.

59 Section 8(3)

In most triangular hire purchase transactions, although the hire purchase agreement is entered into by the owner (finance company) and the hirer, it is common for the instalments to be paid by the hirer via the dealer who would then forward the instalments to the owner. There have been cases whereby crooked dealers do not forward the instalments to the owner and the hirer only realises this when he receives a Notice of Intention to repossess from the owner. The owner who has all this time been happily accepting instalments paid through the dealer now turns around to say that the dealer is not their agent for the purposes of collecting instalments. This, for some consumers may be the first time that he is made to realise that his hire purchase agreement is not with someone with whom he had had no dealings. The Act unfortunately provides no protection to the hirer in such a situation.

#### V. IMPROVING THE HIRE PURCHASE ACT - SOME PROPOSALS

Whilst it cannot be denied that the Hire Purchase Act 1967 has to a certain extent provided consumers with some degree of protection, it is clearly not a piece of legislation which we can be very proud of. Frankly, what is in fact needed is a thorough revamp of the entire Act. What I am going to outline here however are some of the more important areas for reform.

##### Repeal the First Schedule

The primary weakness of the Act is its restrictive scope; the Act only applies to the goods listed in the First Schedule. It is true that since the Act was passed, the First Schedule has been amended twice. However these amendments have not been able to keep up with the number of new items in the market. When the Act was first introduced, the Minister of Trade and Industry justified



the inclusion of the First Schedule in the following terms:- 60

(W) we have still not yet have sufficient experience in the running of this Bill, hence we have included a limited number of articles....

The Act is now more than 22 years old, which means that the Ministry has had the same number of years of experience in enforcing it. Surely the time has come for the Ministry to consider repealing the First Schedule altogether. Such a move will not only be in the interest of consumers, but will also be an important step towards "Malaysianising" the law in this respect. This is because as mentioned earlier, for 'Non-Act' goods, the common law and possibly even some English statutes may still be applicable today - thirty two years after independence.

#### Introduce a Blanket Penal Provision

The other general improvement to the Act which is badly needed is the inclusion of a blanket provision making non-compliance with any provision in the Act an offence. At present we do not have such a provision and as a result, as we have seen, non-compliance with some of the provisions are not offences under the Act. The inclusion of a new provision which provides that failure to comply with any provision in the Act is an offence under the Act will effectively serve this purpose.

#### The Need for a Cooling-Off Period

It is an unfortunate reality that most consumers can be persuaded to agree to enter into hire purchase transactions at their doorsteps by over-zealous salesmen. Many subsequently realised that they have entered into a hire purchase transaction for something which do not

-----



actually need incurring financial commitments which they could ill-afford. While the Act requires the owner to serve upon the potential hirer, a Second Schedule Notice which outlines the hirer's financial commitments, this serves little purpose as there is no specific time period which must lapse between the service of the notice and the signing of the agreement.

Recognising the fact that hire purchase transactions are most important for the poorer and perhaps less educated members of society, a provision must be introduced in the Act which gives the hirer a statutory right to cancel the agreement within a certain period after the agreement is signed. It ought to be pointed out here that a provision to that effect is found in the Consumer Credit Act 1974 of United Kingdom.<sup>61</sup> Surely Malaysian consumers need as much if not more, protection than the United Kingdom counterparts.

#### Payment of Instalments to 'Declare Must be Deemed Payment to Owners

As we have seen triangular hire purchase transactions are frequently plagued by what may be called the 'missing instalment' syndrome - that is, where owners deny receiving instalments which hirers have paid through dealers.

While it is extremely easy to put the blame on consumers for paying their instalments through dealers, the fact remains that this is a prevalent practice particularly in rural areas where the finance companies do not have offices. This fact must therefore be accepted and adequate safeguards must be introduced in the Act to make dealers who receive instalments on behalf of owners,

---

<sup>61</sup> Section 67.



liable when such payments are not transmitted to the owners. This may seem like a radical change to hire purchase law but it is neither new nor unique. The Insurance Act 1963 has a provision to the effect that where the premium for general insurance is received by any person on behalf of the insurer, such receipt shall be deemed to be receipt by the insurer and the onus of proving that the premium was received by a person who was not authorised to receive such premium shall lie on the insurer.<sup>62</sup>

The introduction of a similar provision will go a long way in protecting hirers and in overcoming the 'missing instalments' syndrome. It will also obligate finance companies to ensure that they only deal with reputable dealers. Once finance companies become more selective, dealers will automatically have to safeguard their reputation, lest no finance companies would deal with them.

#### Introduction of a Licensing System

While there seems to be developing a trend at present to use licensing as a means of controlling financial institutions such trend has yet to affect firms carrying out hire purchase transactions. As licensing is undeniably an extremely effective weapon in controlling and regulating the activities of such institutions it is recommended that a system of licensing be introduced for all hire purchase institutions. This will enable the Controller of Hire Purchase to supervise hire purchase transactions more effectively. With a licensing system, hire purchase companies will have to ensure that

---

<sup>62</sup> Insurance Act 1963, section 14A(2).

## 3. EQUIPMENT LEASING

## 1. THE DEVELOPMENT OF EQUIPMENT LEASING

their activities are carried out "by the book" for failure to do so will amount to a breach of the conditions of the licence and may result in the cancellation of the licence.

### Other Reforms

While the Hire Purchase Act clearly needs improving in some of the areas highlighted above, there are also areas where the Act does provide adequate protection but the consumers are not aware of such protection. One clear area is the provisions for determining the hire purchase price, term charges and statutory rebates. Because consumers are not aware of the various mathematical formulae provided, they fail to realise whenever a different formula is used. This is where consumer education has a vital role to play.

Consumer education should not be regarded as the sole responsibility of the consumer bodies alone. It is the moral and social obligation of the government to work not merely towards protecting the consumers but also towards educating them of their rights. For a start perhaps a Consumer Affairs Ministry which is separate from and independent of, the Ministry of Trade and Industry should be set up. After all the government must not merely protect consumers, they must be seen to be doing so.

The birth of the merchant banks in the early 1970s gave new respectability to leasing, which forms one of the many services provided by merchant banks.



## B. EQUIPMENT LEASING

### I. THE DEVELOPMENT OF EQUIPMENT LEASING

Equipment leasing originated from the United States where the first known modern leasing transaction was said to have been entered into in the 1860s when the United Shoe Machinery leased its shoe manufacturing machine. In 1877 the Bell Telephone Company started the trend for leasing office equipment. Since then, equipment leasing has seen a spectacular growth particularly in the period after the Second World War.

Originally leasing, as a means of financing, lacked respectability. It was often associated with entrepreneurs who have failed to obtain the more established forms of financing. The idea of possession without ownership which characterised leasing was regarded as a financial stigma.

However, with the general movement towards a credit economy and with the acceptance of debt financing by the business community, leasing soon became an important aspect of business financing in the Western World. Today all sorts of equipment are leased - from aeroplanes to oil rigs to supertankers and hi-tech office equipment.

Compared to hire purchase, equipment leasing in Malaysia is an extremely new phenomenon.<sup>63</sup> It was said that finance companies offered leasing facilities to its corporate clients in 1967. The United Oriental Leasing Company set up in 1973 claims to be the first leasing company in the country.

The birth of the merchant banks in the early 1970s gave new respectability to leasing, which forms one of the many services provided by merchant banks.

---

63

See Nik Abdul Rahman Nik Mat, "The Law and Practice of Leasing in west Malaysia", Faculty of Law, University of Malaya project Paper 1977/78 and Wong Kim Fatt, "equipment Leasing in Malaysia; Some Legal Aspects and Problems" (1981) 1 MLJ xiii and (1981) 2 MLJ ci.



Leasing as a form of financing has various advantages. The most significant of these is the conservation of capital. It allows the lessee to obtain and use the most modern equipment without any immediate or, substantial cash outlay. This is particularly important for small firms and business organisations which need to use modern machinery to be competitive and yet do not have the necessary capital to purchase such equipment. Leasing also conserves the credit lines available for a particular firm or business organisation. Instead of using available credit lines for purchase of equipment, such credit line can be used for other more profitable purposes.

Leasing also provides the lessee with certain tax benefits. Lease rentals are deductible for the lessee as expenses spent on assets used "in production of gross income"<sup>64</sup>

Leasing is also an extremely useful means of acquiring an equipment which a company needs for a short period of time - for instance a developer may need excavators and other earth-moving equipment only in the earlier phase of housing project. It is business prudence to lease the necessary equipment than to purchase it and let it lie idle once the temporary need has been satisfied.

Certain equipments like computers and business machines can get out of date so quickly that it is not wise for businessman to purchase them. Leasing thus protects the businessman from obsolescence and enables him to keep up with current technology.

---

<sup>64</sup> Income Tax Act 1967, section 33(i). For a detailed analysis of the tax implications of equipment leasing under the Income Tax Leasing Regulations 1986 (PU (A) 131 of 1986) see : Low Hop Bong, "Equipment Leasing - Tax Implications in Malaysia" (1987) 1 MLJ cxxiv and Arjunan Subramaniam, "Income Tax Leasing Regulations 1986 - An Outline" (1987) 1 MLJ xl.



## II. DEFINITION OF LEASING

The term of leasing has no statutory definition. However, the new Banking and Financial Institution Act 1989 defines "leasing business" in the following terms:-<sup>65</sup>

(T)he business of letting or sub-letting movable property on hire for the purpose of the use of such property by the hirer or any other person in any business, profession or occupation or in any commercial, industrial, agricultural or other economic enterprise whatsoever... but does not include the business of hire purchase which is under the Hire Purchase Act 1967;.....

Generally a lease is a contract between a lessor and lessee for the hire of a specified asset selected from the manufacturer or vendor of such assets by the lessee. The lessor retains ownership of the asset. The lessee has possession and use of the asset on payment of specified rental over a period.<sup>66</sup> The main characteristics of leasing are thus (i) contract of hire, (ii) for a selected asset which is usually selected by the lessee from the supplier, and (iii) the lessor retains ownership over the asset.

The fundamental difference between a hire purchase agreement and an agreement for equipment leasing is the fact that in hire purchase agreement the hirer must be given the option to purchase the item. The option to purchase is not normally included in equipment lease agreements although in practice most lessors give lessees the first right of refusal when upon the expiry of the lease, they

---

<sup>65</sup> Section 2.

<sup>66</sup> Credit Corporation (M'sia) Bhd. v KM Basheer Ahamed & Anor (1985) 1 MLJ 208 at p 210 per Syed Agil Barakbah FJ (delivering the judgement of the Federal Court).

wish to dispose of the assets. Furthermore, in the case of financial leases 67 (as opposed to operating leases), the lease will usually be for a fixed minimum period - that is, the primary period - and the lessee cannot terminate the lease during this period.

The other important practical difference between an equipment lease and a hire purchase is the fact that while hire purchase is commonly used by consumers, equipment leasing is widely used by business concerns - from the sole proprietor to firms and even large companies.

Being a contract, the Contracts Act will generally apply to all agreements pertaining to equipment leasing. But a leasing agreement is a special type of contract - a contract of bailment - and Part IX of the Contracts Act which deals with bailment applies.

The Contracts Act defines bailment as :

"... the delivery of goods by one person to another for some purpose upon a contract that they shall, after the fulfilment of the purpose, be returned to the direction of the person delivering them" 68

----- From this definition it is clear that there are two

- 67 A financial lease is usually for a minimum length of time (the primary period) which is unlikely to be less than three years and can even be for as long as ten years. The lease cannot be terminated by the lessee during this period and the total rentals payable during this period will be sufficient to reimburse the lessor for their capital expenditure on the equipment and to provide for interest or some profit on the transactions. Operating leases do not necessarily provide for a minimum period and the lessor does not seek to recover the whole cost of the equipment from the transactions.



### III. THE LAW RELATING TO EQUIPMENT LEASING IN MALAYSIA

Unlike in the area of hire purchase and sale of goods, there is no specific statute governing equipment leasing in Malaysia. Because equipment leasing transactions are entered into by business concerns rather than individual consumers, it is generally assumed that as the parties should be able to bargain at arm's length with each other, there is no reason why the law should intervene and tamper with the fundamental principle of freedom to contract. To the average consumer, the man in the street, equipment leasing has no relevance.

Being a contract, the Contracts Act will generally apply to all agreements pertaining to equipment leasing. But a leasing agreement is a special type of contract - a contract of bailment - and hence Part IX of the Contracts Act which deals with Bailment applies.

The Contracts Act defines bailment as :

".... the delivery of goods by one person to another for some purpose upon a contract that they shall, be returned or otherwise disposed of according to the direction of the person delivering them" 68

From the above definition it is clear that there are two basic elements in a bailments :-

- (i) Delivery of goods - that is, the transfer of possession of the goods from bailor to bailee, and

- (ii) upon termination of the bailment the bailee must either return the goods to the bailor or deal with it in accordance with the bailor's instructions.

Clearly both these basic elements are present in equipment leasing agreements and it is for this reason that Part IX applies.

Part IX imposes various duties upon both bailors and bailees. For instance if the bailor is aware of any faults in the goods bailed which will materially interfere with the bailee's use or expose the bailee to extraordinary risks, then the bailor must disclose such faults to the bailee.<sup>69</sup> In equipment leasing however this provision is hardly relevant. As the equipment is selected by the lessee from the manufacturer or supplier, the bailor will not be in a position to be aware of any defects in the equipment. Furthermore all equipment lease agreements have clauses which exclude the lessor's liability vis-a-vis the condition of the equipment, its merchantable quality, fitness for any purpose, etc.

The Contracts Act imposes a duty upon the bailee to take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his goods.<sup>70</sup> Apart from these general statutory duties as a bailee, normally an equipment lease agreement imposes a medley of other duties and responsibilities upon the lessee vis-a-vis the equipment. This includes the duty to keep the equipment in good and serviceable repair and condition; to ensure that the equipment is operated in a skilful and proper manner, etc.

---

<sup>69</sup> Section 103.

<sup>70</sup> Section 105.



Under the Contract Act, in the absence of any special contract, the bailee is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care which an owner would take if the goods were his.<sup>71</sup> This provision is practically of no significance as far as equipment lease agreements are concerned because there are always clauses therein which provide that the lessee shall bear the entire risk of loss of or damage to the equipment from the date of signing the agreement. In fact, even if the equipment is stolen, destroyed, detained, confiscated, etc for any reason whatsoever, the lessee shall be liable to continue paying rent until the Stipulated Loss Value of the equipment (that is, the agreed capital loss to the lessor and liquidated damages to be indemnified by Lessee to the Lessor, for the lost, theft or destruction of the equipment) is paid by the lessee to the lessor.

Such provisions in equipment lease agreements have been strictly applied and enforced by the courts. The argument that where the equipment is destroyed the agreement is thereby frustrated has been side-stepped by the courts in favour of upholding the terms of the agreement.<sup>72</sup>

The Contracts Act further provides that where by virtue of the bailment, work have to be done on the goods by the bailee on behalf of the bailor for which the bailee receives no remuneration, then the bailor shall repay to the bailee the necessary expenses incurred by him. Again this general provision is normally expressly negated by the lease agreement which normally provides that all such costs must be borne by the bailee.

---

<sup>71</sup> Section 105

<sup>72</sup> See e.g. Tiong Goon v Credit Leasing Corporation Sdn. Bhd (1986) 1 CLJ 604 and Ke Yin Credit & Leasing Sdn. Bhd. v Pang Kim Cha & Bros Development Sdn. Bhd. (1989) 2

From the examples given, it is thus clear that while in theory Part IX of the Contracts Act applies to equipment lease agreements, the truth of the matter is that what ever protection provided by the Act to the lessee (as bailee) are almost always diluted or completely negated by the terms of the lease agreement.

On the other hand, whatever protection provided by the Act to the lessor (the bailor) are almost always further enhanced and strengthened by the terms of the agreement.

Thus while leasing comes within the scope of bailment, it is first and foremost a contract between two parties. Thus, ultimately, it is the lease agreement that determines the duties, rights and responsibilities of each of the parties and it is this agreement that the courts will look at in determining any dispute that arises.

#### IV. LEASE AGREEMENTS

A party who is interested in leasing an equipment would normally decide on the equipment he needs and is able to afford. He would shop around for his ideal equipment from the various dealers or suppliers. Having identified such an equipment he will then deal with the financing aspect of it. If the dealer-supplier happens to be an 'agent' of a leasing company, the dealer himself would be able to provide him with the necessary information and may negotiate the terms of the lease with him.

Otherwise he would have to approach a leasing company armed with all the details relating to the equipment that he proposes to lease and 'argue his case'.

While there may be a number of variable factors that would have to be negotiated, such as the monthly rentals,



mode of payment, length of lease, possibility of renewal, etc., there is very little scope for actual bargaining. The only option available for the potential lessee is whether to enter into the lease agreement on the terms and conditions stipulated by the company or to refuse to do so with the hope that another company would offer better terms.

If having been informed of the lessor's terms and conditions the lessee wishes to go ahead with the agreement, then he is normally required to fill in a proposal form. This is in effect a written request from the potential lessee to the lessor to purchase a specified equipment from a specified dealer or supplier, in accordance with the terms and conditions of the lease agreement proper. At this stage unless the potential lessee is a well-known and respected client of the leasing company, the lessee would be required to provide the necessary information to enable the leasing company to assess the lessee's credit rating. Normally these would include the company's latest balance sheet, profit and loss accounts and a reference from the company's bankers.

Being merely an offer made by the potential lessee to the leasing company, the proposal form is not binding upon the parties until the offer is accepted by the lessor. Under the Contracts Act 1950 such an acceptance is only binding upon the lessee once the lessor puts such acceptance in the course of transmission to the lessee. At anytime before this stage the lessee is free to receive his offer.<sup>73</sup>

Once the proposal is accepted by the lessor, the parties would then have to sign the agreement proper. It is only after this that the lessor orders the equipment from the supplier.

---

<sup>73</sup> See section 4(2) AND SECTION 5(1) of the Contracts Act 1950.

The equipment will be normally delivered to the lessee who is usually required to have insured it. It is also the duty of the lessee to inspect the equipment and to inform the lessor immediately if any defects are found.

#### V. SOME COMMON CLAUSES IN A TYPICAL LEASE AGREEMENT

##### i) Deposit

Although in theory equipment leasing is regarded as 100% financing, that is the lessee, unlike a hirer under a hire purchase agreement, does not need to pay any deposit. In practice some form of deposit is required. Sometimes termed as a security deposit, this amount would be retained by the lessor as security for the due observance and performance of the terms and conditions of the agreement, by the lessee. The amount of this security deposit depends on a number of factors like the value of the equipment and the credit rating of the lessee. Sometimes no security deposit is required, but the lessee is required to pay one month's advance rental.

##### ii) Provisions Pertaining to the Maintenance of the Equipment

The agreement makes it clear that ownership and title to the equipment shall throughout remain vested in the lessor. The lessee shall use and operate the said equipment as a good custodian would. All maintenance and other expenses pertaining to the use of the equipment shall be borne by the lessee. The lessee is also required to insure the equipment, normally with an insurer approved by the lessor. However if upon the occurrence of an insured event (loss or damage of equipment) the insured for any reason whatsoever fails to recover under the insurance policy, this shall not relieve him from any of his liabilities towards the lessor.



### iii) Provisions Pertaining to Default by Lessor

Most lease agreements not only allow the lessor to charge interests on any overdue payments but also allow the lessor to terminate the lease without notice and resume possession of the equipment. As there is also normally a stipulation that time is of the essence of the agreement, the lessor in fact can terminate a lease agreement as soon as one month's rental overdue.

### iv) Exclusion of Lessor's Liability

Most lease agreements in no uncertain terms exclude all liabilities on the part of the lessor and any right or immunity that the lessee might have in respect of any conditions, warranties, etc. relating to the title or condition of the equipment.

### v) Renewal of Lease

Almost all lease agreements have provisions for the lease to be renewed at the lessor's option, if the lessee so desires. Normally the same terms and conditions would apply, with variation as to the total rent, residual value and Stipulated Loss Value.

### vi) Cancellation

Generally all equipment leasing agreements are non-cancellable contracts vis-a-vis the lessee. The lessee is bound by the agreement for the duration of the lease period.

Lessors however are allowed to terminate the agreement and repossess the equipment on a variety of grounds. Apart from default in payment or breach of any term of the agreements, most lease agreements give extremely wide powers of

cancellation to the lessor - for instance, if the lessor shall on any reasonable ground consider itself insecure or if an insurance policy on the equipment is cancelled or if there is a petition for the winding-up of the lessee company.

### Conclusion

It is clear that the only legal principle that is rigorously upheld vis-a-vis equipment lease is the freedom to contract. The provision pertaining to Bailment in the Contracts Act were introduced long before equipment leasing became popular. Hence these provisions, though technically applicable, do not in reality reflect the law relating to equipment leasing.

The question that has to be considered is:- Should we call for a change in the status quo ? Should equipment leasing transactions be subject to greater legislative intervention ?

Given the fact that equipment leasing is now an important aspect of business financing, particularly for smaller business organisations with limited resources, the Government may perhaps want to consider regulating equipment leasing. Such intervention will inevitably mean attempting to put the lessor and the lessee on a more equal footing. Legislative intervention may in fact be the only option available if it can be shown that the expansion of smaller businesses is stifled by "strong arm" tactics of leasing companies. Before that happens, it may be wise for leasing companies to attempt some form of self-regulation.

As a first step perhaps the industry itself should introduce a new standard equipment lease agreement with some of the existing terms either deleted or at least, whittled down. This is absolutely necessary because the history of some of the financial institutions in our country has shown, if the industry fails to put its house in order, then the government will feel compelled to do so.